IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 173

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,
v.
UNITED STATES SMELTING, REFINING & MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY,
Appellees,

and

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,
v.
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING AND REFINING COMPANY,
Appellees.

PETITION BY APPELLEE CARRIERS AND INDUSTRIES FOR REHEARING

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Appellee carriers and industries, in hereby respectfully petitioning for rehearing of the judgment of reversal of this Court of March 27, 1950, are aware, of

course, that the granting of such a petition is, and must be, confined to exceptional circumstances. Appellees believe that the circumstances here are not only exceptional but, very possibly, unique.

Appellees doubt if any Opinion of this Court, involving the validity of the orders of the Interstate Commerce Commission, has ever made so apparent, as does the Opinion here, the complete failure of the parties to convey to the Court any clear understanding of the real nature of the Commission's orders and of the facts of record on which they purport to be based. Appellees themselves may have contributed in substantial measure to such seeming confusion, through their apparent inability, either on argument or even by their two Supplemental Memoranda,* to meet effectively the persistently shifting and contradictory bases upon which counsel for the Commission has sought to interpret and to justify the Commission's orders.

If such confusion exists, however, apportionment of responsibility here is probably irrelevant. An important consideration is that as a result, not only that the appellee carriers and industry would seem to have been

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* *Note:* Throughout this petition the following abbreviated designations will be used:

1. "United States Smelting brief" will refer to the original Joint Brief of appellee Carriers and appellee United States Smelting, Refining & Mining Company.

2. "American Smelting brief" will refer to the original Joint Brief of appellee Carriers and of appellee American Smelting & Refining Company.

3. "First Supplemental Memorandum" will refer to the Joint Supplemental Memorandum of appellee Carriers and appellee American Smelting & Refining Company, filed on February 15, 1950, under telegraphic permission from Mr. Justice Black.

4. "Second Supplemental Memorandum" will refer to the Supplemental Memorandum of appellee American Smelting & Refining Company, filed on motion allowed by the order of this Court of March 27, 1950.

ubjected to a capricious and arbitrary interpretation
f § 6(7) of the Interstate Commerce Act by the Inter-
ate Commerce Commission, unwarranted by any con-
ruction previously put on that section either by the
ommission or by this Court. Even more important,
owever, is that all carriers and all industries are now
ubject to the probability of like capricious and arbi-
ary interferences by the Commission. Unless, there-
ore, the Opinion in this case be clarified, the inevitable
onsequence would seem to be that, both this Court, and
he lower federal courts will be burdened with future
eedless litigation.

That confusion does exist in the present Opinion
eems clear from the following uncertainties and self-
ontradiction which seem apparent on the face of that
pinion.*

I.

The Opinion purports to sustain the power of the
ommission to find violations of § 6(7) of the Act,
hether or not the line-haul rates include compensation
or the terminal services involved. In this respect,
owever, the Opinion appears to be self-contradictory.

(A) At pp. 4 and 5, and also at p. 11, the Opinion
urports to accept the Commission's disclaimer of any
nding as to whether the line-haul rates *do or do not
clude compensation* for such terminal services as un-
ecessary to support its ultimate findings of violations
f § 6(7). Nevertheless, the Opinion, pp. 5 and 6, ap-
ears expressly to recognize that

> "*The essential part of the findings* is that line-haul
> began and ended at the interchange tracks * * *

* The two seemingly fundamental misconceptions which underlie
ese apparent uncertainties and contradictions in the Opinion
e set out in Point VI, *infra*.

and that the performance of services beyond these points *without compensatory charges* results in preferential service in violation of § 6(7)." (Italics supplied)

(B) A further apparent contradiction in this respect appears from the following statement, p. 10 of the Opinion, and by the quotation there made from *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402, 408. The Opinion there states, referring to the terminal services beyond the "flat-yard" at Leadville:

> "These industry services *must be so compensated for*, and *may not be wrapped up* in delivery of a line-haul shipment." (Italics supplied)

This statement would seem to involve either (1) the assumption that the terminal services *are not now compensated* for in the line-haul rates, despite the express disclaimer of any such finding by the Commission and the purported acceptance of such disclaimer in the Opinion, or (2) the acceptance in the Opinion of the representations made on argument by counsel for the Commission that, whether or not the line-haul rates include compensation for such terminal services, such services "may not be wrapped up in delivery of a line-haul shipment", on the theory that segregation of line-haul and terminal charges is, in any event, necessary to avoid a violation of § 6(7). As will later be shown, any such construction of § 6(7) has been repudiated by the Commission itself by its latest order in the so-called *Staley* case, and moreover, is in direct conflict with the construction placed on that section in the Commission's Basic Report in *Ex Parte 104, Part II*, 209 I. C. C. 11.

II.

The Opinion, p. 11, seems implicitly to recognize that the Commission could not lawfully require double payment by the appellee industries for the same services. It, however, seems equally implicit in the Opinion that it recognizes that the Commission's order may nevertheless so result, since the Opinion, in proper concern for protecting the appellees from any such double payment which the carriers might impose under such order, specifically undertakes to indicate, p. 11, that in such event the appellee industries would have a remedy *in futuro*, stating:

> "If the carrier makes a double or unreasonable charge, the industry may be heard upon the reasonableness of the rates."

In thus recognizing that under the Commission's orders the carriers may make "a double or unreasonable charge," it would seem the Opinion should recognize that such potentiality necessarily must invalidate those orders on any of the following grounds:

First: If under the Commission's orders the carriers may make a double charge, those orders cannot be saved from present invalidity by any remedy which the appellee industries may have *in futuro*, even were such remedy clear, which, it will be shown, is doubtful.

Second: The very fact that the Opinion seems unable to determine whether the Commission's orders may result in a double charge should render those orders void for uncertainty.

Third: Even assuming that the Commission's orders are to be construed, contrary to their plain terms, as merely requiring a segregation of line-haul and

switching charges without any increase in the aggregate charges, neither the appellee carriers nor the appellee industries have ever been afforded any hearing to determine whether such segregation is practicable.

It would appear that such hearing is essential in connection with rates on non-ferrous ores and concentrates, which rates, for approximately 50 years, have been graded according to the actual value of such ores and concentrates. Such valuation basis the record shows is necessary in order that small "marginal" producers may ship their low-grade ores and concentrates in competition with high-grade ores and concentrates, thus affording the carriers traffic which would not otherwise move and the smelters raw materials which would not otherwise be available. That such segregation may be impracticable is shown in appellees' First Supplemental Memorandum, pp. 7 and 9, and likewise in the Joint Petition for Rehearing and Reargument already filed by the appellees, Public Utilities Commission of Colorado and Public Service Commission of Utah, Point IV, p. 3.

Fourth: It is further pertinent to note that, should such segregation be impracticable, it would make doubtful whether the appellee industries would have any such remedy *in futuro* as the Opinion suggests, without foregoing, at least in part, the actual valuation basis of rates on non-ferrous ores and concentrates long recognized by the Commission itself as essential to maximum production and transportation of those commodities. *Arlington Silver Mining Co.* v. *Great Northern Ry. Co.*, 83 I. C. C. 255; *Nonferrous Metals*, 204 I. C. C. 319.

III.

The Opinion fails to recognize that any construction of the Commission's orders as not resulting in a double charge must rest on one or the other of the following bases:

(A) The assumption that the line-haul rates *do not include compensation* for the terminal services, which assumption is not open on this record even though, as the Opinion holds, pp. 11-12, the statutory Court was not justified in finding that it is either *res judicata* or the law of the case that such rates do *not* include such compensation. As the record shows, the statutory Court, in temporarily enjoining the Commission's prior orders of October 14, 1946, expressly found that there was no evidence to support the Commission's prior findings that the line-haul rates do *not include compensation* for the terminal switching services, and thereupon, without further hearing, the Commission, in its reports of May 18, 1948, upon which its orders here enjoined are based, expressly repudiated its prior findings in this respect, and expressly disclaimed any finding whatever as to whether line-haul rates do or do not include compensation for the terminal switching services.[1]

(B) The acceptance of the representations of Commission's counsel on argument that segregation of charges for line-haul and terminal services is essential in any event to prevent violations of § 6(7). As already noted, the Opinion, page 10, indicates that the Court may have accepted such representations in there stating:

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[1] See United States Smelting brief, pp. 21-23; American Smelting brief, pp. 24-28.

> "These industry services must be so compensated for, and may not be wrapped up in delivery of a line-haul shipment."

Such representations, however, of its counsel on argument have been repudiated by the Commission itself in its latest order in the so-called *Staley* case. This is shown by the appellees' Second Supplemental Memorandum. As there appears, pp. 4-6, the Commission, by its order of February 6, 1950, in *Cancellation of Terminal Charges at Decatur, Illinois*, I. & S. Docket No. 5387 and *A. E. Staley Mfg. Co., Terminal Allowances*, I. & S. Docket No. 4736, expressly authorized "*de-segregation*" of line-haul and terminal spotting charges which the carriers had previously segregated under the Commission's prior order in *A. E. Staley Mfg. Co., Terminal Allowances*, 245 I. C. C. 383, which order was sustained by this Court in *United States* v. *Wabash R. Co.*, 321 U. S. 403. As shown in such Supplemental Memorandum, the Commission by its latest order authorized the cancellation of charges in addition to line-haul rates for terminal spotting charges, although the carriers had published such additional charges in compliance with the prior order of the Commission sustained by this Court. In so doing the Commission failed to revoke its original finding, 215 I. C. C. 656, 660, likewise sustained by this Court, that the line-haul rates *do not include compensation* for such terminal switching services. It is perhaps significant that the Court's order accepting such Supplemental Memorandum was entered on the very day the Court entered its judgment of reversal. It would, therefore, seem possible that the controlling significance of the Commission's latest order in the *Staley* case was overlooked.

IV.

Wholly aside from the Commission's latest order in the *Staley* case, the Commission, in its Basic Report, in *Ex Parte 104, Part II, supra*, had already expressly recognized that *by appropriate tariff* provision carriers might include both line-haul services and terminal switching services in a single rate, *provided such single rate includes compensation for both services.* Furthermore, it may be said that the Commission itself, as distinguished from its counsel, has never even suggested otherwise, unless its findings in connection with its orders here enjoined be construed to so imply.

The Commission, in its Basic Report in construing § 6(7) states, p. 29:

> "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, *the obligation upon the carrier in such circumstances is to be measured by the compensation received* and not by any definite duty otherwise placed on the carrier by the statutes." (Italics supplied)

The Basic Report further states, p. 33, specifically with reference to § 6(7):

> "The statute prohibits every method of dealing by a carrier by which it directly or indirectly charges less than the published tariff rates. *In the absence of a tariff provision,* for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of § 6 of the act, and necessarily preferential." (Italics supplied)

These constructions placed by the Commission itself in its Basic Report on § 6(7), represent not only good law but good sense. If a carrier collects full compensation from both Industry A and Industry B for the line-haul and switching services each receives, no preference can result to Industry A as against Industry B merely because the tariffs applicable to Industry A permit the payment of full compensation for both line-haul and terminal services in a single inclusive rate, while the tariffs applicable to Industry B provide that such full compensation shall be paid by separate rates respectively applicable exclusively to line-haul and to switching services. Neither, of course, can the payment of full compensation for line-haul and switching services, under appropriate tariff provisions for such payment by a single inclusive rate, result in refunding or remitting any portion of the rates so specified in the tariffs. As will later be shown, both the Commission and this Court have heretofore recognized that tariffs providing a single rate for line-haul and terminal services can violate § 6(7) *only if such single rate does not in fact include compensation for both services*, and therefore is merely an attempt to cloak by tariff provisions rebating and preferential service.

V.

The Point X-Point Y illustrations, p. 9 of the Opinion, seem to be the result of basic misconceptions in the following respects:

(A) These illustrations seem to assume that the Commission by its Basic Report had already designated Point X (the "assembly yard" at Midvale, the "plant yard" at Garfield and the "flat yard" at Leadville) as the points at which line-haul begins and ends,

and that the appellee carriers have undertaken by their tariffs to extend the line-haul to Point Y (points of actual loading and unloading at the smelters), "and even to add one subsequent movement." This assumption inexplicably ignores, without comment or apparent notice, the showing made under Point IV, pp. 42-49 of the original American Smelting brief that the Commission, in its Basic Report, had found merely that preferential service *generally*, though not invariably, results from affording, under line-haul rates, terminal switching services which exceed the equivalent of uninterrupted "simple switching or team-track delivery."

The Basic Report specifically states in this connection, p. 45:

> "*Generally* the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally." (Italics supplied)

As has already been shown under Point IV of this petition, *ante*, pp. 8-10, the Basic Report expressly recognizes, pp. 29 and 33, that this "general" finding has no application where the line-haul rates *include full compensation for both line-haul and terminal services*, and where the carriers' tariffs *expressly provide for the inclusion of the terminal services* in the single rate so published.

(B) Such Point X—Point Y illustrations, moreover, ignore the controlling distinctions between both

the tariff provisions and the physical nature of the terminal services in the instant cases, and those involved in all prior decisions of this Court cited in its Opinion.

As shown in Appendix C to the original Brief of the American Smelting, all prior decisions of this Court cited in its Opinion, except that in *Corn Products Refining Co.* v. *United States*, 331 U. S. 790,* involved tariffs providing for the payment by the carriers of "allowances" to the industries for the perfo mance by the industries of terminal services between agreed "interchange tracks" and points of actual loading and unloading at the industries. Moreover, the records in such cases show that such "interchange tracks", and not such points of actual loading and unloading, had always constituted the points of actual receipt and delivery as between the carriers and the industries; and that prior to the publication of such "allowance" tariffs, the carriers had never performed any terminal services beyond such "interchange tracks", all such terminal services having always been performed by the industries at their own expense.

As shown at p. 46 of the American Smelting Brief, the Commission's Basic Report, in recognition of this, states, p. 45, of that Report:

> "It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. *Many of the industries which now receive allowances*, or the performance by the carriers of the spotting service in lieu thereof, *performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers*, and at

* The Corn Products case will be shown distinguishable from the instant cases on other grounds.

the time the change was made, the line-haul rates were not altered. In such cases, the carriers simply assumed a burden not previously borne."

In the instant cases the record shows without contradiction* that the appellee carriers have never delivered or received car-load freight at the points now arbitrarily designated by the Commission as "interchange tracks", but for approximately 50 years have received and delivered all shipments at their own expense at points of actual loading and unloading at the smelters. Further, the record shows that the points so designated by the Commission have never been actual "interchange tracks" as between the appellee carriers and the appellee industries, but have been "interchange tracks" only as between the appellee carriers themselves, as at Midvale and Garfield, or as at Leadville, between the road-haul and switching engines of the sole carrier there involved.**

Third: In consequence of the foregoing, the Court's Opinion in the paragraph beginning at the bottom, p. 9, and ending on p. 10, and in the footnote thereto, wholly misinterprets the effect of the change in 1938 of the tariff provisions at Midvale and Garfield in relation to the tariff provisions previously applying at those points, and still applying at Leadville. The result of the 1938 change at Midvale and Garfield *was to reduce the terminal services previously rendered at all three points* under the line-haul rate without additional charge, and to impose additional charges at Midvale and Garfield for so-called "interrupted move-

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* United States Smelting Brief, pp. 31-46; American Smelting Brief, Point VII, pp. 70-76.

** United States Smelting Brief, pp. 40-41; American Smelting Brief, pp. 73-74.

ments", although the record shows without contradiction that compensation for *all* terminal switching services, *including such "interrupted movements"*, is included in the line-haul rates at all three points (R. 456).

VI.

The foregoing uncertainties and contradictions which seem to inhere in the Opinion would appear to be the result of two basic misconceptions which permeate the Opinion, due to the failure of these appellees to make clear to the Court two propositions which appellees believe cannot be contraverted:

(A) That while, as the Opinion states, p. 6, the authority of the Commission "to establish the point where line-haul service begins and ends is not to be doubted," nevertheless the very terminal services here involved are expressly defined by § 1(3) of the Act* as constituting "transportation", which under § 1(4) of the Act,** the carriers are expressly required to furnish "upon reasonable request therefor." The reason that the Commission, nevertheless, has undoubted authority to determine that line-haul rates do not include terminal services, is that such authority is obviously essential to prevent rebating or preferential service under § 6(7), or undue discrimination or undue preju-

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* See *United States* v. *American Sheet & Tin Plate Co.*, *supra*, p. 407, quoting § 1(3) as follows:

> "The term 'transportation' shall include * * * all services in connection with the receipt, delivery, elevation, and transfer in transit * * * of property transported."

** § 1(4) of the Act provides:

> "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor * * *."

dice under § 2 and § 3, *where particular line-haul rates do not in fact include compensation for terminal services.*

These appellees are undeniably at fault in having failed previously to call to the Court's attention these express provisions of § 1(3) and § 1(4). It is, however, to be noted that in every case cited in the Court's Opinion, where the Court has heretofore recognized the authority of the Commission to determine that line-haul rates do not include terminal services, whether such determination was made under § 6(7), or under §§ 2 and 3, the record has expressly shown that the line-haul rates *did not include compensation* for the terminal services in question in those cases.* In such cases, the Court might also have recognized, though it did not expressly do so, that no "reasonable request" could be made under § 1(4) for the furnishing of such terminal services, *in the absence of compensation for them* either in the line-haul rates or by charges in addition to the line-haul rates.

(B) That there is a basic distinction between what is necessary to constitute violations of § 6(7) where, *as here,* violations are alleged to result solely from *compliance* by carriers with the express provisions of their duly filed and published tariffs, and where violations are alleged to result from *departures* by carriers from the provisions of their tariffs.

It will be observed from the quotation of § 6(7) in

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* See analysis of prior decisions of this Court under Point V of Brief of American Smelting, pp. 50-66, and analysis of findings of Commission in connection with its orders under § 6(7) embraced by such decisions, Appendix C, to that Brief, pp. c-1 to c-13. Also see *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 377 (cited in footnote to p. 7 of the Opinion here) and *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 525-526 (cited Opinion, p. 11).

the footnote to p. 4 of the Opinion, that by the express terms of that section, *any departure* by carriers from the provisions of their filed tariffs constitutes *per se* a violation of § 6(7). Nothing, however, in the express terms of that section, it will further be observed, makes *compliance* by carriers with the provisions of their tariffs a violation of that section. Therefore, neither this Court nor the Commission, has ever held in any case, including the instant cases, until the Commission's latest orders herein, that § 6(7) can be violated by *compliance* by carriers with the express provisions of their tariffs, *unless such tariff provisions themselves violate either the provisions of § 6(7), against rebating or preferential service, or the provisions of §§ 2 and 3 of the Act against undue discrimination or undue prejudice.* Accordingly, neither this Court nor the Commission has never previously found that carriers have violated § 6(7) by rendering terminal services or paying "allowances" therefor *in compliance* with the express provisions of their tariffs, except where the line-haul rates have been found *not to include compensation* for such terminal services.

Indeed, the first case in which this Court recognized that *compliance* by carriers with the express provisions of their tariffs might constitute a violation of § 6(7), was in *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507. There this Court held, pp. 525-526, that despite the fact that the carriers' tariffs expressly provided for "in-transit storage" under the line-haul rates, the rendition of such service *in strict compliance* with such tariffs, nevertheless violated not only § 6(7) but §§ 2 and 3 of the Act, because the line-haul rates were found not to include any compensation for such "in-transit" storage, and in fact to be rendered by the carriers at "out-of-pocket" expense.

On the same basis, the other decisions of this Court cited in its Opinion, and here re-cited for convenience in the sub-joined footnote,* sustained orders of the Commission forbidding the payment of "allowances" to industries for the performance of terminal services by industries beyond the "interchange tracks" at which the Commission found line-haul service to begin and end, as violative of § 6(7), although the payment of such "allowances" was *in compliance* with the express provisions of the tariffs of such carriers. In all such cited cases however, the Commission had expressly found, and this Court expressly so recognized,** that the line-haul rates *did not contain compensation for any terminal services* beyond established "interchange tracks", designated by the Commission as the points at which line-haul transportation began and ended. Moreover, as already shown, under Point V (B), the record in such cases showed that such "interchange tracks" had always been the actual points of delivery and receipt of shipments between the carriers and the industries, and that prior to the publication of tariff provisions for such "allowances", the industries had always performed at their own expense all terminal services between such "interchange tracks" and points of actual loading and unloading at the industries.

The only other decision of this Court, cited in its Opinion, sustaining findings of the Commission of violations of § 6(7) in connection with the performance of terminal services at industries, is *Corn Products*

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* *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Company* v. *United States*, 301 U. S. 669; *A. O. Smith Corporation* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 150; *United States* v. *Wabash R. Co.* (Staley case), 321 U. S. 403.

** See American Smelting brief, Point V, pp. 50-65 and Appendix C thereto, pp. c-1 to c-13.

Refining Co. v. *United States*, 331 U. S. 790, is also the only cited case which is not an "allowance case", and the only such case in which the violations of § 6(7) were based on *departures* and not on *compliance* by the carriers with their published tariffs. As shown by the Commission's Reports, 262 I. C. C. 57 and 266 I. C. C. 181, and by the Opinion of the Statutory Court, 69 F. Supp. 869, whose judgment was affirmed on motion by this Court, the carriers' tariffs did not expressly provide for the performance under the line-haul rates of the terminal services to and from points of actual loading and unloading at the industry. Therefore, the Commission held; consistently with its "general" finding in *Ex Parte 104, Part II, supra*, p. 45, that the carriers' line-haul rates did not include such terminal services, and that the rendition of them under such line-haul rates consequently constituted a *departure* from the provisions of the carriers' tariffs.

CONCLUSION

Appellees respectfully submit that the order of reversal should be set aside and the judgment of the Statutory Court affirmed, without prejudice to the obvious right of the Commission to make any proper order under any appropriate section of the Act should it appear, after due hearing by adequate evidence, that the line-haul rates of appellee carriers *do not in fact contain compensation* for the terminal services here involved.

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